United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

75-2124

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Pls

To be argued by
RHONDA AMKRAUT BAYER

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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UNITED STATES OF AMERICA ex rel. WILLIAM STUBBS,

Petitioner-Appellant,

-against-

H.J. SMITH, Superintendent, Attica Correctional Facility,

Respondent-Appellee.

----------X

ON APPEAL FROM AN ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Respondent-
Appellee
Office & P.O. Address
Two World Trade Center
New York, New York 10047
Tel. No. 488-2097

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RHONDA AMKRAUT BAYER
Deputy Assistant Attorney General
of Counsel

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BRIEF FOR RESPONDENT-APPELLEE

Questions Presented

1. May appellant present claims to this Court which were never raised in either the District Court or any State Court?

2. Is New York Penal Law, former § 1899(3) which provides that the presence of a weapon in an automobile is presumptive evidence of its possession by all persons occupying the automobile at the time the weapon is found, unconstitutional?

Statement

In this habeas corpus proceeding, William Stubbs appeals from a decision of the United States District Court for the Western District of New York (Curtin, J.) rendered May 29, 1975, dismissing the petition which raised the following contentions: (a) the use of the presumption of possession as found in former New York Penal Law § 1099 where a co-defendant has already plead guilty to possession of the same weapon is a violation of petitioner's constitutional right to due process of law; (b) the prosecution's suppression of evidence and concealment of vital information from the jury constitutes a violation of petitioner's constitutional right to due process of law.

Facts

Appellant was convicted in Monroe County, New York in 1966 for Assault in the First Degree and Possession of a Firearm. On October 7, 1966 he was sentenced as a second offender to a term of 19-20 years on the assault charge and 13-14 years on the firearms charge, the sentences to run consecutively.

On June 24, 1968, the Appellate Division, Fourth Department unanimously affirmed the conviction, 30 A D 2d 777 and reargument was denied on September 19, 1968 (30 A D 2d 932). Leave to appeal was subsequently denied by the New York Court of Appeals. On February 24, 1969, the Supreme Court of the United States denied certiorari (393 U.S. 1108).

Prior Proceedings

A. State Court Trial

Appellant's trial commenced on September 9, 1966 following a hearing on his motion to suppress all the physical evidence obtained which was denied by the trial court (M. 59-62).*

At trial the People called three witnesses.

MARK BENJAMIN WUNDER testified that he was home on the evening of March 29, 1966. Shortly after nine o'clock he heard his dog begin barking and stepped outside to investigate (M. 89). Checking his backyard, Mr. Wunder noticed his dog sniffing excitedly as they walked along a hedge (M. 90). Going to the edge of the hedge, Mr. Wunder saw a man there in a crouched position, wearing an Army type parka with a hood on it (M. 90-91). The man stood up and left hurriedly (M. 91). Mr. Wunder pursued him (M. 92-93).

At trial, Mr. Wunder identified appellant as the man found in his yard (M. 93).

Continuing to pursue appellant, Mr. Wunder yelled for his neighbor, Detective Lieutenant George Reiss (M. 94-95). Mr. Wunder proceeded to follow appellant when appellant stopped, turned around

* Parenthetical numbers preceded by "M" refer to the minutes of the State Court proceeding.

and told Mr. Wunder not to follow him anymore (M. 95-96). When he turned to face Mr. Wunder, appellant covered the lower part of his face with a dark or black cloth (M. 95-96). As Mr. Wunder continued to follow him, appellant turned and fired a gun at Mr. Wunder (M. 96-99). Mr. Wunder then cut across the street and heard another shot whiz past him (M. 99). He could see the gun in appellant's hand pointed at him (M. 100). As Mr. Wunder crossed the sidewalk, appellant fired a third shot at him (M. 100-102). Each time the gun was fired, Mr. Wunder could see appellant, covering his face, holding a gun aimed at him (M. 102).

Subsequently, Mr. Wunder headed for Lieutenant Reiss' home to seek help (M. 102-103).

Mr. Wunder explained to Lt. Reiss what had happened; Lt. Reiss got his gun and a jacket and the two entered a police car and drove to the last point at which Mr. Wunder had seen appellant (M. 103-105). They observed a dark colored cadillac cruising slowly, driven by a woman (M. 105). After following the car for a while, Lt. Reiss took Mr. Wunder home (M. 109).

Mr. Wunder saw appellant again that evening at the police station still dressed in the parka he had on when Wunder first saw him (M. 110).

ROBERT ANNECHIARICO testified that he was home on the evening of March 29 when he heard what he thought was some firecrackers at about nine o'clock (M. 176). He went to his window and saw Mr. Wunder chasing a man down the street (M. 177). He then saw the man being chased turn around, pull a cloth up to his face, tell Mr. Wunder to get back and then fire a shot at him (M. 178). He heard three shots altogether (M. 179) and noticed that the man wore dark clothing and a head covering (M. 180).

GEORGE REISS testified that he was employed as a Lieutenant of Detectives in the Police Department, City of Rochester and was Mr. Wunder's next door neighbor (M. 207). On the evening of March 29 Mr. Wunder came to his home and told him that he had chased a prowler from his yard and that the man had shot at him (M. 210). He took his gun, put on his coat and hat and entered a police car with Mr. Wunder at about nine-fifteen (M. 211). Mr. Wunder described the prowler as short, stocky, approximately five foot five wearing a green Army color parka with a hood, three quarter length (M. 211). While in the front of Mr. Wunder's home waiting for Wunder to get a jacket, he observed a 1957 or 1958 dark Cadillac driven by a woman and proceeding slowly. The woman was blond and had a ponytail (M. 211-213). The car turned left. When Wunder returned to the car, they proceeded to the vicinity where Wunder had last seen the man who shot him (M. 213). He saw the same Cadillac driving slowly (M. 214-215). He proceeded to follow the car, took the license plate number and eventually drove to Wunder's home, and dropped Wunder off (M. 215-220).

Finding the car again, he continued to follow it and observed a figure moving swiftly about five or six feet behind the car going towards the driver's side (M. 222). The figure was short and stocky, wearing a three-quarter length parka, dark color, with a hood (M. 223). The figure got into the driver's seat of the car. He continued to follow the car, checked the license plate number and radioed to other officers to set up a roadblock to stop the car (M. 224).

The car picked up speed and Lt. Reiss continued to follow (M. 225). Eventually he observed a police car turn a red flasher and pull out in front of him behind the Cadillac (M. 227). The Cadillac pulled over and stopped with the police car behind him (M. 227). Reiss pulled in front of the Cadillac (M. 228). Lt. Reiss got out of his car and at gunpoint, ordered the man driving out of the car. He identified appellant as that man (M. 228-229).

He arrested appellant and searched the vehicle. The glove compartment was opened. Inside there was a revolver (M. 234). There were six .22 caliber rounds of ammunition in the gun (M. 236). The gun was test fired (M. 237-242). Reiss found a box containing 50 rounds of .22 caliber ammunition in the glove compartment of the car. He also found a belt containing three .22 caliber cartridges and 3 empty

loops (M. 244-246). Reiss also took a green parka from appellant and a black kerchief was found in the pocket of the green parka worn by appellant (M. 247-248).

The Cadillac was registered to William Stubbs (M. 271).

The defense called no witnesses.

The Court charged the jurors (M. 304-348) and asked defense counsel if there were any exceptions or requests to charge.

Defense counsel requested that the jury be charged that one element of the crime of possession is a knowing or intentional or voluntary possession on the part of the defendant. The Court then told the jury:

> ". . .I so charge. Of course, a person cannot be found guilty of possession of an unlawful item unless one knew he had it. As an example I could get in my car and somebody could have put a gun in that glove compartment and, of course, I knew nothing about it; I would not be guilty of it. It has to be a knowing possession, you have to find the defendant had knowledge." (M. 348).

The People requested that the jury be instructed that:

> "the presence in an automobile other than a stolen one or a public omnibus, of any fire-arm described in Section 1897, is presumptive evidence of its possession by all persons occupying said automobile at the time such weapon is found, except if such weapon is found in an automobile which is being operated for hire by a duly licensed driver or if the weapon so found is a pistol or revolver and one of the occupants has a valid license." (M. 349-350).

The Court inquired as to whether defense counsel wished to be heard on the prosecutor's request. Counsel responded:

> "No, I understand its Section 1899." (M. 350).

The Court then charged that:

> "Section 1899 of the Penal Law says that the finding of a gun in an automobile is presumptive evidence that the gun was possessed by all persons in that car, in short, the law says, the locating of a gun in the car means that it may be presumed, if you are satisfied the gun was so found, it may be presumed by you as a jury that that gun was in possession of, specifically in this case, passengers are not involved, the accused here is, you may presume that that gun was in the possession of the owner-occupant driver of the car." (M. 350-351).

There were no further exceptions or requests (M. 351).

B. Federal Court

On May 29, 1975, after considering the briefs submitted by petitioner's counsel and respondent, the District Court rendered a detailed reasoned decision denying petitioner's application and dismissing the petition.

The Court ruled that there was sufficient evidence before the jury for them to conclude beyond a reasonable doubt that the weapon was found in the glove compartment and coupled with the evidence of petitioner's involvement in a shooting minutes before was sufficient for a finding of power to exercise dominion and control over the weapon by the petitioner (A. 4).

Relevant Statute

New York Penal Law, former § 1899:

> "Presumptions of possession, unlawful intent and defacement.
>
> 3. The presence in an automobile, other than a stolen one or a public omnibus, of any firearm, defaced firearm, firearm silencer, bomb, bombshell, gravity knife, switchblade knife, dagger, dirk, stiletto, billy, blackjack, metal knuckles, sandbag, sandclub or slungshot is presumptive evidence of its possession by all persons occupying such automobile at the time such weapon, instrument or appliance is found, except under the following circumstances: (a) if such weapon, instrument or appliance is found upon the person of one of the occupants therein; (b) if such weapon, instrument or appliance is found in an automobile which is being operated for hire by a duly licensed driver in the due, lawful and proper pursuit of his trade, then such presumption shall not apply to the driver or (c) if the weapon so found is a pistol or revolver and one of the occupants, not present under duress, has in his possession a valid license to have and carry concealed the same."

POINT I

ISSUES WHICH WERE NEVER PRESENTED BY APPELLANT IN EITHER THE DISTRICT COURT OR THE STATE COURTS ARE NOT PROPERLY RAISED IN THIS COURT.

On this appeal, appellant raises, for the first time anywhere, the issue of the constitutionality of New York Penal Law, former § 1899(3).

This issue has not been raised and litigated in either the District Court or the State courts. On this appeal, appellant has apparently abandoned each issue presented in his petition, implicitly conceding that those claims were without merit. Rather, appellant makes an improper attempt to have this Court consider an entirely new issue, an attempt obviously untenable.

The law in this Court is abundantly clear on the raising of new issues which never before have been presented to the District Court or to the State Courts. In United States ex rel. Springle v. Follette, 435 F. 2d 1380 (2d Cir. 1970), cert. denied 401 U.S. 980 (1971), petitioner, in his brief to the Second Circuit, contended for the first time that the prosecutor's summation was unnecessarily inflammatory. The Court there said:

> "Since this point was not raised in the petition for the writ of habeas corpus, it is not properly before us. Even if it has been raised in the petition, we would decline to consider the contention on grounds of lack of exhaustion of state remedies, the contention not having been adequately raised in the appeal in the state court." (435 F. 2d at 1384).

This holding is fully in accord with previous decisions by this Court. See, e.g. United States ex rel. Ross v. LaVallee, 341 F. 2d 823, 823, 824, n. 1 (2d Cir. 1965), cert. denied 382 U.S. 867 (1965)[Court would not consider petitioner's new argument that certain of his post-arrest statements were wrongly admitted at trial]; United States ex rel. Krzywosz v. Wilkins, 336 F. 2d 509, 511-12 (2d Cir.

1964)[petitioner's new contention that there was a plot by the District Attorney's office to force his guilty plea was not allowed]; United States ex rel. Fein v. Deegan, 410 F. 2d 13 (2d Cir.), cert. denied 395 U.S. 935 (1969)[In that case petitioner argued for the first time in his reply brief that the blue ribbon jury statute under which he was tried was unconstitutional. This Court did not even reach the question since petitioner did not raise the claim in the District Court, nor had he exhausted his state remedies (410 F. 2d at 23)].

This Second Circuit rule on newly presented issues is also the rule of other Circuits. See, e.g. Moore v. Wainwright, 458 F. 2d 982, 984 (5th Cir. 1972); Montgomery v. Caldwell, 457 F. 2d 767, 768 (5th Cir. 1972); Macon v. Craven, 457 F. 2d 342, 343 (9th Cir. 1972); Brown v. Wisconsin State Department of Public Welfare, 457 F. 2d 1350, 1353 (8th Cir. 1970); Hoggatt v. Page, 432 F. 2d 41, 42-43 (10th Cir. 1970).

The reasons for this rule are abundantly clear. First, this Court is only reviewing a ruling on the petition by the District Court. It is not a court of the first instance for petitioner's claims, but an appellate court. Thus, when a new contention is presented to this Court, the court is "confined on appeal to a review of the petition which appellant filed below." United States ex rel. Krzywosz v. Wilkins, supra at 511-12. The rational for this is not

attributable to a formal structuring of the federal courts only. It is the District Court which is charged with initial evaluation and fact finding. Thus, when an issue is raised for the first time in this Court, the District Court has had no opportunity to evaluate the petition and to hold a hearing, if necessary. See United States ex rel. Fein v. Deegan, supra at 23. Likewise, the responding party is deprived of his opportunity to present to that Court its evidence in opposition to the claim.

In the District Court, appellant claimed that the use of the presumption of possession where a co-defendant has already pleaded guilty to possession of the weapon is violative of due process. A reading of the argument presented to the District Court demonstrates conclusively that appellant urged not that the presumption was unconstitutional but that "the use of the presumption of possession in his case was prejudicial and in violation of his constitutional right to due process of law."*

In the court below, appellant noted:

> "Nor is the petitioner challenging the use of the presumption where two co-defendants are tried together for illegal possession of a firearm, and where both deny possession. It is the petitioner's argument that once a co-defendant pleads guilty to possession, the burden of proving the possession on the remaining defendant lies with the prosecuting officials."**

* Brief for Appellant in the District Court, p. 11.

** Brief for Appellant in the District Court, p. 12.

Furthermore, it is evident from the opinion of the court below that it considered appellant's argument to be limited to the proposition that

> ". . .the plea of guilty to the possession charge by [appellant's] co-defendant constitutes actual possession on the part of his co-defendant. Therefore, the exception under the statute when one occupant has actual possession [former New York Penal Law Section 1899(3)(a)] must be applied to him." (A. 2-3).

The court below accordingly concluded that "If the presumption is valid in a joint trial to apply it after a plea seems to me equally valid." (A. 3)*

Thus, since appellant's claim was not raised in his application to the District Court, it is not properly before this court.

Moreover, appellant cannot be allowed to avoid the exhaustion requirement of 28 U.S.C. § 2254(b) and (c) by presenting to this Court claims which have never been raised and litigated in the state courts.

The District Court noted that at the time of sentencing, appellant raised the issues which were presented to the District Court but stated that in view of the summary affirmance of his conviction,

* As already noted, appellant conceded in the court below the validity of the presumption in a joint trial.

the Court could not be sure that the state appellate courts had considered them. The Court ruled, however that "requiring exhaustion would be futile because the contentions made are without merit." (A. 2).

It is fundamental that, as an applicant for federal habeas relief, appellant has the burden of demonstrating that he has exhausted available state remedies. 28 U.S.C. § 2254(b); Picard v. Connor, 404 U.S. 270 (1971). While appellant may have raised the issues presented to the District Court at the time of sentencing neither those claims nor the claim advanced in this Court were pursued on appeal.

In order to fulfill the exhaustion requirement, the State courts must be given a "full and fair opportunity to correct its own errors of federal constitutional dimension." United States v. Follette, 298 F. Supp. 973, 975 (S.D.N.Y. 1969). See Picard v. Connor, supra. This Court has consistently affirmed this principle. E.g. United States ex rel. Gibbs v. Zelker, 465 F. 2d 1121 (2d Cir. 1972), cert. denied 409 U.S. 1045; United States ex rel. Rogers v. LaVallee, 463 F. 2d 185 (2d Cir. 1972); United States ex rel. Carter v. LaVallee, 441 F. 2d 620 (2d Cir. 1971).

Indeed, because of the "important role the exhaustion doctrine has assumed in the maintenance of a proper balance of authority between the national and state governments in our federal system," this Court has considered the exhaustion question when it was not

presented to it on appeal. United States ex rel. Wissenfeld v. Wilkins, 281 F. 2d 707, 710 (2d Cir. 1960). Accord, United States ex rel. Johnson v. Vincent, 507 F. 2d 309 (2d Cir. 1974), cert. denied ___U.S.___(1975).

Where the normal appellate process has been exhausted or is no longer available, this Court has required that, prior to seeking federal relief, a habeas corpus applicant must first seek relief by resorting to New York State's post-conviction procedures or other remedies made available by State law. United States ex rel. Smith v. Montanye, 505 F. 2d 1355 (2d Cir. 1974), cert. denied, ___U.S.___ (1975). See United States ex rel. Johnson v. Vincent, supra.

In the instant case, appellant has not only failed to "fairly present" his claim to the state appellate courts, but has never presented them at all.

Indeed, as appellant currently concedes, when the prosecution requested that the jury be charged on the statutory presumption, defense counsel was asked by the court if he wished to be heard on the matter but he declined to comment or object (Applt. Br., p. 6).

By declining to object to the charge, the trial judge was not given the opportunity to conduct the trial as appellant would have liked. Henry v. Mississippi, 379 U.S. 443 (1965). It is well settled law that issues not raised at trial cannot be considered by the appellate court as a basis for reversal. United States v. Ramsey, 291 F. 2d 737 (6th Cir. 1961), cert. denied 368 U.S. 899. The issue

was not presented to the state courts and thus appellant's failure to satisfy the exhaustion requirement of 28 U.S.C. § 2254(b) and (c) is clear.*

In any event, appellant's failure to raise this issue in the District Court, as well as in any state court, precludes consideration of his claim by this Court. Moreover, as appellant notes (Aplt. Br., p. 3), a prior application for habeas corpus relief was considered by the federal courts and ultimately rejected by the United States Supreme Court. This earlier petition raised approximately ten claims, yet none of them concerned the validity of New York Penal Law, former § 1899. Appellant has not in any way explained his failure to raise the issue presented in this appeal in his earlier application. Thus, relief should not be granted until appellant offers an explanation sufficient to satisfy the Court that he has not deliberately withheld the instant claim or otherwise abused the writ. 28 U.S.C. § 2244 (b); United States ex rel. Nelson v. Zelker, 465 F. 2d 1121, 1124 (2d Cir. 1974), cert. denied 409 U.S. 1045; Johnson v. Copinger, 420 F. 2d 395 (4th Cir. 1969).

POINT II

EVIDENCE OF APPELLANT'S OWNERSHIP AND OCCUPANCY OF THE AUTOMOBILE AT THE TIME THE GUN WAS FOUND WITHIN IT COUPLED WITH EVIDENCE THAT HE HAD FIRED THREE SHOTS AT A MAN MINUTES EARLIER WAS SUFFICIENT TO ESTABLISH HIS POSSESSION OF THE GUN.

Appellant contends that the statutory presumption found in New York Penal Law, former § 1899(3) which provides that presence in

* Indeed, appellant's failure to either object at trial or to present this claim on direct appeal constitutes a waiver of the claim. E.G. United States ex rel. Irons v. Montanye, 520 F. 2d 646, 648-649 (2d Cir. 1975); United States ex rel. Schaedel v. Follette, 447 F. 2d 1297 (2d Cir. 1971); United States ex rel. Agron v. Herold, 426 F. 2d 125 (2d Cir. 1970).

an automobile of a weapon is presumptive evidence of its possession by all those occupying the automobile at the time the weapon is found is irrational and arbitrary.

Under New York law, the statutory presumption of illegal possession of a gun by all persons found in the automobile is a rebuttable one and merely assumes that in the absence of some explanation, the occupants of an automobile at the time a gun is found within it are in possession of the gun. If the persons in the automobile have no actual knowledge of its presence, there cannot be a conviction. The burden of establishing possession of the gun, beyond a reasonable doubt remains with the People. People v. Russo, 278 App. Div. 98 (1st Dept. 1951), affd. 303 N.Y. 673 (1951). Possession of weapons in the Penal Code refers to "knowing and voluntary possession 'which places the weapon within the immediate control and reach of the accused and where it is available for unlawful use if he so desires.' (People v. Persce, 204 N.Y. 397, 402)." 278 App. Div. at 101. Possession is not restricted to actual possession but includes constructive possession. 278 App. Div. at 101; People v. Ledyard, 32 Misc 2d 714 (Co. Ct., Queens Co., 1962).

In People v. Russo, supra at 104, the Court articulated the reasons for the enactment of § 1899.

> "It is common knowledge that the automobile is frequently employed as an agency in the furtherance of violent and serious crimes committed not by one but by several individuals. Before the enactment of section 1898-a of the Penal Law*. . ., where a

* The predecessor to Section 1899.

> group of persons were about to embark on a mission of law-breaking in an automobile in which a revolver was placed, no law could reach any of the occupants unless it was established that the weapon was found on the person of an occupant. . .Urgent need for legislation making the presence of a forbidden firearm in an automobile presumptive evidence of its possession by all occupants was judicially recognized . . .It is not unreasonable to require, as the statute in effect commands that those who occupy an automobile in which a revolver or other dangerous weapon is found should explain their knowledge of its presence in the automobile." (Citations ommitted).

Before the presumption can be used, the People must offer proof in support of the inference of possession sufficient to establish constructive possession beyond a reasonable doubt. People v. Siplin, 29 N Y 2d 841 (1971); People v. Lunsford, 46 A D 2d 612 (1st Dept. 1974); People v. Jefferson, 43 A D 2d 112 (1st Dept. 1973).

Thus construed by the New York courts, the statutory presumption submitted to the jury in this case clearly accords with due process.

In Tot v. United States, 319 U.S. 463 (1943), the Court announced the "rational connection" test for determining the constitutionality of a statutory presumption.

> ". . .a statutory presumption cannot be sustained if there is no rational connection between the fact proved and the ultimate fact presumed, if the inference of the one from proof of the other is arbitrary because of lack of connection between the two in common experience." 319 U.S. 463, 467-468.

This rational connection standard was applied by the Court in its consideration of two subsequent challenges to presumptions created by federal statute. United States v. Romano, 382 U.S. 136 (1965); United States v. Gainey, 380 U.S. 63 (1965). Addressing itself to the application of this statute, the Court in Gainey noted:

> "The process of making the determination of rationality is by its nature, highly empirical, and in matters not within specialized judicial competence or completely commonplace, significant weight should be accorded the capacity of Congress to amass the stuff of actual experience and cull conclusions from it."

As the Court in People v. Russo, supra explained, the enactment of New York Penal Law, former § 1899 was in response to the urgent necessity for the Legislature to recognize and act on what was and is "common knowledge." Where the People must produce evidence sufficient to establish possession beyond a reasonable doubt before the statutory presumption can be invoked its connection with the fact presumed, possession, is hardly too tenuous to permit a reasonable inference of guilt. United States v. Romano, supra.

In Leary v. United States, 395 U.S. 6, 36 (1969), the Court noted that:

> "a criminal statutory presumption must be regarded as 'irrational' or 'arbitrary' and hence unconstitutional, unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proven fact on which it is made to depend."

In Leary, the Court considered the constitutionality of 21 U.S.C. § 176(a) which provided that one in possession of marijuana is deemed to know if its unlawful importation. The Court declined to hold the inference of illegal importation unconstitutional but ruled that the inference of knowledge of such was a denial of due process. As noted earlier the New York courts have already held that absent independent evidence to support a finding of knowing and voluntary possession the statutory presumption of § 1899 may not be applied.

More recently the Court has held that possession of stolen property, if not satisfactorily explained, is sufficient to raise the inference that the person in possession was aware that it had been stolen and noted that there is a rational connection between the unexplained possession of recently stolen property and knowledge that the property was stolen. Barnes v. United States, 412 U.S. 837 (1973).*

The Court thus declined to require the "reasonable doubt" standard urged by appellant but it did define what that standard was:

> ". . .the evidence necessary to invoke the inference is sufficient for a rational juror

* The Court again reaffirmed the Tot "rational connection" standard noting that where, as in the case under consideration, the presumption would satisfy a reasonable doubt standard, it certainly had a rational connection. 412 U.S. 837, 846, n. 11.

to find the inferred fact beyond a reasonable doubt.. . ." 412 U.S. at 843*

The Supreme Court, having adhered to the rational connection standard and declining to require a "reasonable doubt" standard when testing the constitutionality of presumptions created by federal statute, it would be inappropriate for this Court to first announce a more stringent requirement when considering a state statute on a collateral attack to a state conviction. However, it is clear that the evidence necessary to invoke the presumption under state law, is sufficient for a juror to find the inferred fact beyond a reasonable doubt.

In the instant case the evidence amply established appellant's possession of the gun.

Appellant owned, occupied and was driving the automobile in which the gun was found at the time it was found. Three loops on the belt were empty of shells and the undisputed evidence was that appellant had fired three shots at Mr. Wunder moments earlier. The gun was fired

* Appellant's reliance on Mullaney v. Wilbur, ___ U.S. ___, 44 L. ed. 2d 508 (1975) is misplaced. Mullaney involved Maine's rule which required a defendant charged with murder to prove by a preponderance of the evidence that he acted in the heat of passion, on sudden provocation, to reduce the charge to manslaughter. Thus, a criminal defendant could be convicted of the higher crime which carried a more severe penalty absent any proof of malice afterthought, an essential element of the crime. In the instant case, the People must offer proof sufficient to support the inference of possession before the presumption can be invoked. The People cannot rely on a defendant's failure to prove non-possession by a preponderance of the evidence in order to sustain a conviction.

by a man wearing a green parka with a hood who held a black kerchief over his face. Both items of apparel were found on appellant. A man matching perfectly the description given of the individual who had fired at Mr. Wunder was seen entering the automobile and taking the driver's seat of the vehicle, subsequently stopped by police officers. Appellant was in the driver's seat of that car. He was found in close proximity to the scene of the shooting only minutes later.

The evidence was thus sufficient to support a finding that appellant knowingly possessed a weapon which was within his immediate control and available for unlawful use beyond a reasonable doubt.

In Craven v. United States, 478 F. 2d 1329 (6th Cir. 1973), cert. denied 414 U.S. 866 (1973), the Court considered the sufficiency of evidence to establish possession of firearms. The defendant was convicted of, inter alia, possession of firearms in violation of 26 U.S.C. §§ 5861(d) and 5871. The Court held that evidence of defendant's joint constructive possession of the residence in which the firearms were found was sufficient to establish possession of the firearms where only eight days before he was charged with possession, he was seen in the master bedroom of the residence, sitting in a bed on which a firearm was lying, even though the defendant was not present in the residence at the time the firearms were found.

In the instant case, appellant was in the automobile when the gun was found within it and only minutes earlier had been seen not only in possession of a gun but using one as well. Under the circumstances, the presumption did no more than "accord to the evidence, if unexplained, its natural probative value", United States v. Gainey, supra at 71.*

In the District Court, appellant claimed that the prosecutor's failure to disclose to the jury the fact that his co-defendant had pleaded guilty to possession of the gun found constituted suppression of evidence and was thereby unconstitutional. This claim has not been pursued on appeal. Nevertheless, appellant emphasizes the fact of Shirley Miller's guilty plea and takes particular note of the fact that such had not been disclosed to the jury. In this regard, it should be noted that her plea of guilty is of no probative value. Possession may be joint. She did not admit having actual possession of the gun and it was not disputed that the gun was found in the glove compartment of appellant's car.

* Appellant notes that the Court's charge included the statement "passengers are not involved, the accused here is, you may presume that the gun was in the possession of the owner-occupant of the car." There was abundant testimony indicating that when the automobile was first seen it was driven by a woman and that she was still in the car when it was stopped. However, she was not on trial with appellant, and thus as the Court noted, was not involved; only appellant was. He was the only one with whom the jury need have been concerned.

Appellant was made aware of her plea, prior to the commencement of his trial (M. 12), and the defense could have made the jury aware of it if they so desired. However, for the prosecution to reveal to the jury that appellant's co-defendant had pled guilty would constitute prejudicial and reversible error. People v. Colascione, 22 N Y 2d 65 (1968).

CONCLUSION

THE ORDER OF THE DISTRICT COURT
SHOULD BE AFFIRMED.

Dated: New York, New York
November 28, 1975

Respectfully submitted,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Appellee

SAMUEL A. HIRSHOWITZ
First Assistant Attorney General

RHONDA AMKRAUT BAYER
Deputy Assistant Attorney General
of Counsel

STATE OF NEW YORK)
: SS.:
COUNTY OF NEW YORK)

BERNADETTE MERLINO , being duly sworn, deposes and says that she is employed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 28th day of November , 1975 , s he served the annexed upon the following named person :

RICHARD GREENBERG
Attorney for Appellant
The Legal Aid Society
Federal Defender Services Unit
509 United States Courthouse
Foley Square
New York, N.Y. 10007

Attorney in the within entitled proceeding by depositing three copies a true and correct ~~copy~~ thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Bernadette Merlino

Sworn to before me this
28th day of November , 1975

Rhonda Ambrosini Bayer
Assistant Attorney General
of the State of New York